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IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 37

TEXTILE WORKERS UNION OF AMERICA,

Petitioner,

vs.

DARLINGTON MANUFACTURING COMPANY, DEERING MILLIKEN, INC., DEERING, MILLIKEN & COMPANY, INC., and NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Textile Workers Union of America, AFL-CIO, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on November 19, 1963.

Citations to Opinions Below

The opinion of the Court of Appeals is reported at 54LRRM 2499 (4th Cir. 1963) (not yet officially reported). It is printed at Appendix A, *infra*, p. 1a. The decision of the National Labor Relations Board is reported at 139 NLRB 241 (1962). It is printed in the Joint Appendix, pp. 1-33.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 19, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and under §10(e) of the National Labor Relations Act, 29 U. S. C. §160(e).

Questions Presented

1) Where the National Labor Relations Board has found that a single-employer status exists between a chain of related corporations and one particular one of these corporations, a plant corporation (and where that finding is not controverted by the Circuit Court of Appeals), and where the particular plant is closed and its corporation extinguished in order to punish its employees for voting in favor of unionization in an NLRB election, and to deter employees in other plants in the chain from organizing a union, does this constitute an abolition of the entire employer entity or only the closing down of part of the operation? If the action constitutes the closing down of part of the operation, is it the "absolute prerogative" of the employer to do so, and is the discontinuation thus conduct which connot constitute an unfair labor practice? If the action constitutes an abolition of the entire employer entity, is it the "absolute prerogative" of the employer to take this action, and is the action thus conduct which cannot constitute an unfair labor practice?

2) If the closing down of a plant and the extinguishing of its corporation in order to punish its employees for voting in favor of unionization and to deter employees in the

employer's plants from organizing *does* constitute an unfair labor practice, does a remedy which does not restore the situation to that which would have obtained but for the illegal discrimination constitute a proper remedy?

3) Where the NLRB finds that one individual has exercised control of the labor relations policies of an employer and has himself caused the commission of acts found to be unfair labor practices, is he rendered not liable for these unfair labor practices because the charge against him was filed against "Roger Milliken, President" rather than simply against "Roger Milliken?"

The Statute Involved

The statutory provisions involved are the following sections of the National Labor Relations Act: §2(2), 29 U. S. C. §152(2); §2(3), 29 U. S. C. §152(3); §7, 29 U. S. C. §157; §8(a)(1), 29 U. S. C. §158(a)(1); §8(a)(3), 29 U. S. C. §158(a)(3); §8(a)(5), 29 U. S. C. §158(a)(5); §10(c), 29 U. S. C. §160(c). They are printed at Appendix B, *infra*, p. 1b.

Statement of the Case

These consolidated cases arise out of a charge and amended charge filed in accordance with Section 10(b) of the National Labor Relations Act by Textile Workers Union of America (hereinafter sometimes called TWUA or the Union) on September 6, 1956 and November 1, 1956 against Darlington Manufacturing Company (hereinafter sometimes called Darlington), Roger Milliken, President, and Deering Milliken & Company, Inc. (hereinafter sometimes

called Deering Milliken). On October 18, 1962, the National Labor Relations Board issued its order against Darlington, Deering Milliken and its successor in interest, Deering Milliken, Inc. Darlington, Deering Milliken, Inc. and TWUA appealed the NLRB decision to the Circuit Court, in accordance with §10(f) of the National Labor Relations Act, and the NLRB petitioned the Circuit Court for enforcement against Deering Milliken & Company, Inc., in accordance with the provisions of Section 10(e) of the National Labor Relations Act. On November 19, 1963, the Court of Appeals denied enforcement of the Board's Order.

I. Facts Found

The Court of Appeals accepted the findings of fact made by the National Labor Relations Board. The Court's refusal to enforce the decision of the Board was based upon conclusions of law which differed from the Board's conclusions, not upon any disagreement as to the facts in the case. Thus, the facts summarized herein are primarily those found by the NLRB, supplemented by additional facts from the record not referred to by the NLRB. ("J. A." references are to the Joint Appendix. "S. A." referenees are to that portion of the Joint Appendix inadvertantly omitted by the printer from the bound volumes of Appendix and therefore printed as an Appendix (pp. 176-182) to the NLRB's brief to the Fourth Circuit. "Tr." references are to the original transcript. References preceding a semicolon are to the Board's finding; succeeding references are to the supporting evidence.)

A. Single-Employer Status

The NLRB found (and the Court did not find to the contrary) that Darlington, Deering Milliken, Deering Milliken, Inc., and other affiliated corporations constituted a single employer within the meaning of the law, on the grounds that there is among the corporations a sufficient degree of common ownership and common control of labor relations and operations to constitute a common enterprise (J. A. 23). Briefly, the supporting evidence relied upon by the Board consisted of Milliken family ownership of a substantial majority of the stock of all affiliated corporations, identity of officers and directors of affiliated corporations, the Millikens' exercised ability to eliminate corporate lines where such elimination was to their advantage, the exercise by one individual—Roger Milliken—of control over the labor relations of all affiliated corporations, and the actual operation of the interlocking corporations as an integrated enterprise (J. A. 23-27).

B. The Employer's Pre-election Efforts to Defeat the Union

TWUA began its organizing campaign at Darlington in March of 1956. The Employer responded with a classic full-scale anti-union campaign, the focal point of which was an unremitting series of threats by supervisory personnel that the mill would be closed if the employees chose union representation. (The Board's count was that the record contained approximately 30 such threats. J. A. 4, Note 7.) The threats were accompanied by extensive interrogation of employees by supervisors regarding their union activities. (The Board counted about 20 instances of interrogation. J. A. 4, Note 6).

C. The Election and the Mill Closing

The Employer's pre-election campaign of coercion was almost successful; on September 6, 1956, the Union won the NLRB election by a margin of only 256 to 248 (J. A. 250-251). Local management immediately notified Roger Milliken of the election results (J. A. 279). On the following day Milliken decided to "recommend" the closing of the mill to Darlington's directors and stockholders (J. A. 4; 1092). He testified (J. A. 4; 457):

> "I felt that as a result of the campaign that had been conducted and the promises and statements made in these letters that had been distributed [by the Union], that if we had some possible hope of achieving competitive . . . [costs] . . . by taking advantage of new machinery that was being put in, that this hope had diminished as a result of the election because a majority of the employees had voted in favor of the union."

Milliken immediately called a special meeting of the Darlington Board of Directors for September 12th (J. A. 5; 279-280). The Board of Directors met only for an hour and one-quarter, and during that time other business was transacted: a dividend was declared, a new director was elected and complex changes in the Deering Milliken Mills Retirement Plan were approved (J. A. 427, 448, 1257-1261, 1290, 1322). In the remaining portion of one hour the Directors voted unanimously to liquidate the mill and to call a special meeting of stockholders to approve the proposal (J. A. 431). After the Board of Directors' meeting the Darlington supervisors informed the employees that the mill was being closed because of the Union's victory

(J. A. 5, note 10; the Board refers to record evidence of about 25 statements by supervisors to employees that the Union's election victory was responsible for the closing of the plant and would result in the blacklisting of the employees in their search for new jobs.) At this time a petition disavowing the Union was circulated in the plant. Members of management sought to convince employees to support this petition (J. A. 5, note 10).

The stockholders met on October 17 to consider a resolution which recited that the directors were recommending dissolution of the corporation because of "certain developments" that related to Darlington's operations. Roger Milliken identified the "certain developments" as ". . . the recent election where the majority of the people in the plant . . . [were] . . . for the Union . . ." (J. A. 5; 292). South Carolina State Senator Mozingo, who was present at the stockholders' meeting, gave uncontradicted testimony that Milliken opened the meeting with the statement "that on September 6, when [the employees] voted for a union . . . he decided to close the mill." The stockholders approved the resolution to liquidate. Senator Mozingo testified, also without contradiction, that he had the following conversation with Milliken after the meeting (J. A. 266):

> ". . . [Milliken] said, 'Well, you will probably get another industry here in Darlington,' and I said, 'How do you expect us to get another industry when you are leaving a s[t]igma on us here that can't be erased . . . Not only that, it is unfair because eighty-three percent of these people I am told have signed a petition to go back to work . . .' he said, 'As long as there are seventeen percent of the hard core crowd here, I refuse to run the mill.' "

D. The Liquidation of the Mill and the Refusal to Bargain.

Before the Board of Directors meeting the Union had asked Darlington for a bargaining conference. The Company replied that the Union would have to wait until it was officially certified by the Board; on the same day the company filed objections to the election. Although these objections were overruled, they did delay certification (J. A. 5, 5 note 9; 253).

After the Board of Directors met, the mill took no new orders from customers; it continued to operate the plant to fill the orders it had. Of these old orders, it filled some, and cancelled others (J. A. 933-934, 955-956, Tr. 2856-2862). Those orders which Darlington was unable to fill or cancel were filled by other Deering Milliken mills (J. A. 928, 934, 941-943, 950, 1788-1789). As the work ran out, the employees worked shorter and shorter hours and were eventually terminated (J. A. 11, note 22). On October 17th the Board of Directors authorized a partial liquidating dividend amounting to one and one-half million dollars—about 40% of the mill's assets (J. A. 1274, G. C. Ex. 9, 15(f), Tr. 187, 901-904, 1129).

On October 24th TWUA was certified. The next day the Union wired Plant Manager Oeland urging that a bargaining conference be held by October 30th. By letter dated November 2nd, the Union requested a list of all employees who had been terminated, their job classifications and the date of their termination (J. A. 1249, Tr. 24). A bargaining conference was finally held on November 7th. At it, the Union asked for information regarding wages and fringe benefits. The Company refused to provide the information (J. A. 254). By letter dated November 26th, the Union asked the Company for the names of all employees, together with their length of service, job classifications, job duties

and individual wage rates and for other information regarding jobs and wages. The Company replied, "Before we give you information, we will have to be assured that it is for a legitimate use." (J. A. 1250-1253).

The operations of the plant ceased altogether on November 24, 1956; and on December 12 and 13, 1956, the plant equipment was sold at auction (J. A. 6; 258). Thereafter, the Deering Milliken corporation continued to sell, to Darlington's former customers, textiles of a kind previously made by Darlington but now made by other Deering Milliken mills (J. A. 934-941, 947-957, 965-966).

E. The Use of the Shutdown of Darlington to Prevent Union Organization at Other Deering Milliken Mills

On November 14, 1956, Roger Milliken forwarded to the treasurers of a number of Deering Milliken mills, and to certain employees and officials of the Deering Milliken Service Corporation, a news item describing the permanent shutdown of a Massachusetts bedspread factory because "since signing a labor contract last February, the Union had kept the mill in a state of turmoil and reduced efficiency and production to the point that the owners were convinced the Mill had no future and investment of further funds [was] not justified" (G. C. Ex. N-1, J. A. 1677, 969). In the same mailing Milliken sent a memorandum explaining the importance of a magazine article from *America's Textile Reporter*, together with a copy of the article (G. C. Ex. N-1, J. A. 25; 969, S. A. 176-182.) This was the mailing which the NLRB stated was "obviously intended as a primer to the managers of the mills in combatting union organization" (J. A. 25). Milliken stated that the article showed that "this magazine made a real investigation in Darlington" (J. A. 25; 969). He further stated, "the unions are

going to be making a tremendous drive all through this area, and there are few things that are more important to us than making sure that the leaders in your community understand and are sympathetic to what you are trying to do" (J. A. 25; 969, Tr. 2915). He urged a careful reading of the second part of the article which stated, *inter alia* (S. A. 182):

> "If the people of Darlington knew anything of the the Deering Milliken record, they would know that that management * * * has [not] intended to share the prerogatives of management with labor union leaders. This has been the case through three generations of Milliken operations. When the Madison Woolen Mills of Madison, Maine, became not only unprofitable but unionized Mr. Gerrish Milliken liquidated it * * *. When the Dallas Manufacturing Company of Huntsbille, Alabama, became unionized, the Millikens liquidated it, contrary to the opinion of many local people that such would not be the case. We ourselves are small shareholders in Darlington and from experience and acquaintanceship, we knew the minute the union election vote was announced that we would receive a call for a special meeting to vote for liquidation."

The article also described the economic distress in the City of Darlington (with a population which Rand McNally Cosmopolitan World Atlas (1959) states is less than 6,000) within a week after the shutdown was announced, with the prospect that 560 jobs and a weekly payroll of more than $29,000 would be lost to the economy of the city (J. A. 284-285, 969, S. A. 177-181). In addition, the article pointed out that the employees who voted against the Union would have to "suffer" along with those who voted for it.

II. The NLRB's Conclusions of Law and Remedial Order

The Board unanimously found that Darlington violated Section 8(a)(1) of the Act by threatening employees that the plant would be shut down if the Union won the election, by telling the employees that the mill had been shut down for this reason, by threatening that union adherents would be blacklisted, by supporting a petition disavowing the Union, and by interrogating its employees about their union activity (J. A. 6-7). A majority of the Board also found that Darlington, Deering Milliken, Deering Milliken, Inc., and affiliated companies, occupy the status of a single employer, and that, therefore, such conduct also constituted a statutory violation by Deering Milliken and Deering Milliken, Inc. (J. A. 23-27). The Board unanimously found that the plant was shut down in order to discourage the employees' union activity and in order to avoid bargaining with the Union (J. A. 7-9). A majority of the Board found that the shutdown constituted a violation of Section 8(a)(3), (5), and (1) of the Act by Darlington and by Deering Milliken (J. A. 10-18, 23-27). The Board unanimously found that Darlington violated Section 8(a)(5) and (1) of the Act by refusing to bargain with respect to the tenure of employment of the employees in the Darlington mill, and by refusing to furnish the Union with wage and related bargaining data (J. A. 18-19). A majority of the Board also found that such conduct constituted a statutory violation by Deering Milliken.

The Board dismissed the complaint as to Roger Milliken individually, on the ground that the underlying charge was insufficient in that it charged him as "Roger Milliken, Presi-

dent," and that this did not constitute a charge against Roger Milliken (J. A. 29-30).

The Board's order requires Darlington, Deering Milliken, and Deering Milliken, Inc., to cease and desist from the unfair labor practices found; and, if operations are resumed in Darlington, South Carolina, to bargain with the Union as the employees' exclusive representative (J. A. 30-31). Darlington, Deering Milliken, and Deering Milliken, Inc., are further required to make whole all the employees who were on the payroll on October 13, 1956 (the date on which the stockholders voted to liquidate the plant), for any loss of pay they may have suffered as a result of the discrimination against them. If the Darlington plant does not reopen, the backpay period is to terminate when the employees are able to obtain substantially equivalent employment, or the date on which they are placed on a preferential hiring list at other Deering Milliken mills (J. A. 21-23, 27-28). They are also required to advertise in a Darlington newspaper, and to mail to each employee, copies of an appropriate notice (J. A. 32, 39-41). Deering Milliken and Deering Milliken, Inc., are also required to offer employment or placement on a preferential hiring list to the Darlington employees at other Deering Milliken mills in South Carolina or adjacent States; to pay the travel and moving expenses of the employees who accept the offer; and to bargain collectively with the Union for the purpose of reaching an agreement as to the mode of operation of the preferential hiring lists, and as to the terms and conditions under which the former employees of the Darlington mill may, if they desire obtain such employment (J. A. 27-29, 32-33). In

addition, Deering Milliken and Deering Milliken, Inc., are required to mail a notice to this effect to each employee on the payroll of the Darlington mill on October 13, 1956 (J. A. 32-33, 42). In its order, the Board reserves the right to modify the backpay and reinstatement provisions, if necessitated by circumstances not now apparent (J. A. 33).

III. The Decision of the Court of Appeals

The Court of Appeals denied enforcement of the Board's Order (appendix A, p. 1a, *infra*). The majority on the Court, held that "to go out of business *in toto*, or to discontinue it in part, permanently at any time . . . was Darlington's absolute prerogative." Having found that Darlington was without liability because of this absolute right, the Court held that the finding that Darlington was without liability prevented the "project [ion of] Darlington's liability . . . upon [Deering] Milliken"; "furthermore, even if Darlington was a division of Milliken, the transfer of Darlington's liability to Milliken upon the single employer principle is precluded because, as we have stated, a part, like the whole, of a business may be abolished when the extinction is consummated in circumstances like the present."

As to the violations of the law found by the NLRB independent of the actual mill closing—Darlington's pre- and post- election statements constituting interference in violation of §8(a)(1) of the Act, and the refusals to bargain constituting violations of §8(a)(5) of the Act—the Court held that "remedies for these offenses are not now available as Darlington is no longer alive."

The dissenting minority of the Court of Appeals agreed with the NLRB's finding that Deering Milliken's closing of the Darlington Mill was an unfair labor practice; and that the employer's threats, interrogation, refusal to bargain, and refusal to provide bargaining data, all constituted unfair labor practices. (Appendix A, p. 14a, *infra*).

Reasons for Granting the Writ

I. The Court of Appeals Has Decided Important Questions of Federal Law Which Should Be Settled by This Court.

A. The Question of Whether the Employer's Conduct Constitutes an Unfair Labor Practice

The United States Government has guaranteed to the working people of this country that it will protect their "right to self organization, to form, join, or assist labor organizations" (§7 of the National Labor Relations Act). In Darlington, South Carolina, in 1956, 256 of Deering Milliken's Darlington employees relied upon this guarantee and exercised their right to vote that they wanted to be represented by Textile Workers Union of America. Within a week their Employer, with utter disdain for the law, struck them down; more than 500 jobs were snuffed out in order to punish a group of workers for daring to exercise their rights. The economy of the town was shattered.

In the Darlington case the National Labor Relations Board has acted to make good the promise of protection of their rights held out to workers who seek to organize, by the National Labor Relations Act. It is important that

federal law be a protection rather than a trap for the citizens who rely upon it. It is therefore important, as well as proper, that the action of the NLRB be upheld.

Deering Miliken did not stop when it had destroyed the livelihoods of its 500 Darlington employees in order to punish them for their union activities. It followed up this act with a warning to the employees in the 26 other Deering Milliken mills. Roger Milliken mailed to the other mills the article from *America's Textile Reporter* which announced that Darlington was only one instance of the standard Deering Milliken policy of liquidating any mill which "became unionized." He directed the managers of these various mills to make sure that their communities understood the Deering Milliken operation better than the Darlington community had understood it. In short, Roger Milliken put all the other thousands of Deering Milliken workers on notice that if they were so foolish as to believe that they had any rights under federal law, they would get the same treatment from their employer that the Darlington workers had received.

For as long as the economic massacre at Darlington goes unremedied, all of the other Deering Milliken employees will be deprived of their rights under the National Labor Relations Act, since no sane worker will seek to exercise illusory rights if it is clear that the United States does not stand behind the rights which federal law supposedly guarantees.

And it is not only the employees of Deering Milliken who have been affected by the Darlington plant shutdown. All southern workers—and particularly the hundreds of

thousands of southern textile workers—have felt the impact of Darlington. The closing of the Darlington mill was a major news story throughout the South. And southern employers did not let that story die; for eight years it has been told and retold during union organizing campaigns throughout the South. The newspaper headlines on the day of the NLRB decision were a ray of hope to southern workers who wanted to believe that it is possible to exercise the rights provided by the National Labor Relations Act. But the even larger headlines throughout the South on the day of the Circuit Court's decision again confronted southern workers with the mockery of having a right but no remedy.

So much for the reasons why it is of serious practical and humane importance to southern workers that this Court uphold the NLRB decision that the mill closing was an unfair labor pracice. Let us now consider the legal importance of the issue.

The statute provides flatly that it is an unfair labor practice for an employer to discourage membership in any labor organization by discrimination with regard to hire or tenure of employment. The cases are clear that it is an unfair labor practice if an employer discriminatorily fires one, two, or ten workers—in spite of the fact that at common law an employer has the absolute prerogative to discharge. The decision of the Circuit Court carves an exception out of the Statute for that situation where an employer discriminatorily but permanently closes down an entire department and fires *all* the workers in it. Congress did not write that exception into the statute; on the con-

trary, any such exception is an absolute violation of the clear command of Section 8(a)(3) of the Act.

It has been argued that the newly-created exception is not important because few employers will choose permanently to shut down a whole department or a whole plant. But in fact any of the vast twentieth century multiplant employers can shut down one plant and produce in its other plants just as easily as Deering Milliken has done. The shutting down of a mere department is even easier.

The threat that if workers organize, management will close down the mill is one of the most frequently used of all anti-union coercive tactics. No one doubts that it is unlawful for an employer to make this threat. Presumably then, the decisions of federal courts and of the National Labor Relations Board should have the effect of discouraging employers from making this threat. But if the courts of the United States declare that it was lawful for this employer to close down the Darlington plant in retaliation for the workers' union organization, then their decision will encourage other employers to make the unlawful threat to take the same action, not discourage them from doing so.

B. The Question of an Effective Remedy

For eight years now Deering Milliken has been teaching its employees and all other southern workers the lesson that the rights which the government proclaims in the National Labor Relations Act are an illusion. The major reason why this Court should grant certiorari and reverse the decision of the Circuit Court is, essentially, to undo the effect of this lesson. This undoing requires two elements: (1) the

essentially theoretical act of holding Deering Milliken's conduct at Darlington to be an unfair labor practice, and (2) the practically effective act of really righting the wrong which was done by Deering Milliken. If the law only goes as far as to say that Deering Milliken's action was wrong, and does not make the injured workers whole, then the pattern of plant-closing threats will continue.

The Labor Board's proposed remedy is that the employer pay to the workers who were discharged because of the union back pay for the period, for each individual employee, from the date of his discharge to the date on which he was able to obtain substantially equivalent employment, and that Deering Milliken offer these workers employment in its other mills "in South Carolina or adjacent states" to the extent that jobs are open in these mills, without permitting the discriminatees to exercise their seniority to displace employees with less seniority. Those discriminatees for whom there are no slots open are to be placed upon a preferential hiring list with back pay tolling at the time they are listed. The employer is ordered to bargain with the Union regarding the mechanics of workers' obtaining employment at other Deering Milliken mills and the mechanics of the hiring lists.

But this does not undo the injury which was done to the Darlington workers. These workers, if it had not been for the unfair labor practices, would have continued to live and work in their own home community and would have been represented on the job by the Union. They were part of the Darlington community. They belonged to that community by ties of family, friendship, tradition and property.

They include workers such as Mrs. Nora King, who began working for Darlington in 1907 when she was 7 years old (J. A. 379), and Mr. John Benjamin Plummer, who had worked for the Company for 38 years (J. A. 319). The situation of Mrs. King and Mr. Plummer is not exceptional. Taking the General Counsel's witnesses as as good a random sample of the Darlington workers as any (and the only sample available in the record), out of the 35 witnesses, 34 clearly indicated their length of employment. Approximately half had worked at the mill 15 years or more, and more than two-thirds had worked there ten years or more.

The only way in which the injury which was done can be undone is to order Deering Milliken to reopen a Darlington mill and offer reinstatement there. Failing that, the Court should at least eliminate the worst inequities in the remedy fashioned by the NLRB in order to protect the pedagogic function of the decision in this case. It is that function which makes this decision so important for all southern workers.

C. The Question of the Liability of Roger Milliken

Decisions are not made by corporations. They are made by the individual men who at various levels are the bosses within the corporations. In this case we have the agreement of all who considered the question—the NLRB, the Trial Examiner and the minority on the Court of Appeals (the majority had no occasion to consider the question)—that it was Roger Milliken who created, shaped and pressed forward the entire pattern of unfair labor practices at Darlington. He decided to close the plant. He stated that, "as long as there are 17% of these hard core labor people

here, I refuse to operate the mill." (J. A. 268); he circulated to the other Deering Milliken mills the directive to publicize in their communities the report that Deering Milliken would always shut down any plant which was organized.

The definition of an employer in the National Labor Relations Act explicitly provides that "the term 'employer' includes any person acting as an agent of an employer." (§2(2)). The cases clearly hold individual corporate officers liable for unfair labor practices committed directly by them.

But in this case the Board found that Roger Milliken could not be held liable for the unfair labor practices which he had committed for the reason that a charge filed against "Roger Milliken, President" was not "sufficient to support a complaint against Roger Milliken as an individual" (J. A. 29).

The Board's decision is incorrect. A charge against "Roger Milliken, President" has an effect identical to the effect of a charge against "Roger Milliken"; under §2(2) there can be no difference between charging a man as an individual or principal and charging him as an agent, since the statute makes it explicit that agents are to be treated as employers just as are principals.

It is important that this error be corrected. Corporation presidents who throw 500 workers out on to the street in order to demonstrate that they will not permit southern textile workers to exercise the rights granted by the federal government should not be allowed to hide behind their corporations and thus avoid responsibility for their individual decision making. Some 20 years ago the government of

the United States took the position at Nuremberg that individuals who break the law could not pass the blame for their individual acts off upon "the system." Our government did not take this position merely to seek vengeance. We looked to the future and sought to prevent the commission of future atrocities by establishing the principle that the individual is responsible for his acts.

The responsibility we impose in South Carolina should be no less than the responsibility we imposed in Germany—and for the same reason. Until individual bosses are held personally responsible for their economic Lidices, they will not be deterred from repeating them.

II. The Decision of the Court of Appeals in This Case Conflicts With Decisions of Other Court of Appeals

The Court here holds that, in any case in which the shutdown is permanent, an employer is protected from being held liable for closing down a part of its operation in order to discriminate against pro-union workers in that segment of the operation. But other courts of appeals have squarely held that the discriminatory permanent shutdown of part of a business violates the statute.

In *NLRB* v. *Missouri Transit Co.*, 250 F. 2d 261 (8th Cir. 1957) the employer had sold all the equipment used in one of its two operations, discontinued that operation, and fired all of the employees who had worked on it. The Board found that the sale and the discharges were discriminatory and were therefore unfair labor practices, and ordered the company to place the dischargees on a preferential hiring list and to pay back pay for the period between

the discharges and the reinstatement (reinstatement either to jobs or to status on the preferential hiring list.) The Eighth Circuit enforced the Board's order.

In *NLRB* v. *Wallick*, 198 F. 2d 477 (3rd Cir. 1952), the Board order required a respondent partnership which operated several enterprises engaged in the manufacture of ladies' garments either to reopen a plant which it had closed in violation of the Act because its employees had organized or to give its employees an opportunity to work in other plants operated by the partnership (even though the closed plant was owned by a separate corporation the stock of which was owned by the individual partners). The Third Circuit enforced.

The courts also held that the discriminatory permanent shutdown of part of a business violates the state in: *A. M. Andrews Company of Oregon* v. *NLRB*, 236 F. 2d 44 (9th Cir. 1956); *NLRB* v. *Lexington Electric Products Co.*, 283 F. 2d 54 (3rd Cir. 1960) and *NLRB* v. *Somerset Classics, Inc.*, 193 F. 2d 613 (2nd Cir. 1952). All of these holdings are of course in direct conflict with the holding of the Fourth Circuit in the instant case that it is the absolute right of an employer to abolish a part of its business even for discriminatory reasons.

If this Court finds that this closing down of one plant in the chain constitutes the abolition of the entire employer entity, then presumably it can find that Darlington committed an unfair labor practice (by its final closing down) only by holding that the abolition of the whole of a business can constitute an unfair labor practice. (Such a holding would, of course, not be necessary in order to find that the

layoffs of those employees who were laid off during the tapering-down period prior to the complete closing of the business were, for that period, an unfair labor practice.) As the Court of Appeals and the Labor Board stated, there are apparently no earlier cases treating of a discriminatory total permanent shutdown because of union activities. But surely the cases holding that a discriminatory total *temporary* shutdown constitutes an unfair labor practice, conflict in principle, if not head-on, with the instant case. Surely, if it is unlawful to discriminate by a temporary shutdown, it is the more unlawful to discriminate permanently. The First and Tenth Circuits have held that total temporary discriminatory shutdowns violate the Act in *NLRB* v. *Somerset Shoe Co.*, 111 F. 2d 681 (1st Cir. 1940), *Utah Plumbing Contractors Association* v. *NLRB*, 294 F. 2d 165 (10 Cir. 1961), and *NLRB* v. *Crow Bar Coal Co.*, 141 F. 2d 317 (10 Cir. 1944).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: New York, N. Y.,
February 10, 1964.

Respectfully submitted,

PATRICIA EAMES,
Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8790.

DARLINGTON MANUFACTURING COMPANY and DEERING MILLIKEN, INC.,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.
TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Intervenor.

ON PETITION TO REVIEW AND SET ASIDE ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

No. 8861.

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.
DARLINGTON MANUFACTURING COMPANY

Appendix A

and DEERING MILLIKEN, INC.,
Intervenors.

ON PETITION TO REVIEW AND MODIFY A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

No. 8906.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

DEERING MILLIKEN AND COMPANY, INC.
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued June 13, 1963. Decided November 15, 1963.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN and BELL, Circuit Judges, sitting en banc.

ALBERT V. BRYAN, Circuit Judge:

The National Labor Relations Board in these consolidated cases has made these pivotal decisions[1]:

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[1] 139 NLRB No. 23, decided October 18, 1962.

Appendix A

1. Darlington Manufacturing Company committed an unfair labor practice under the National Labor Relations Act, Section 8(a)(3)[2]—forbidding discrimination in regard to tenure of employment—by closing and liquidating its only plant, and discharging its employees, in 1956 because of the election of Textile Workers Union of America, AFL-CIO as bargaining representative for the employees;

2. Darlington must pay all of such discharged employees their wages, less current net earnings, "until the discharged employees are able to obtain substantially equivalent employment" or until they are put on a preferential hiring list by Deering Milliken, Inc.; and

3. Deering Milliken, Inc. and its affiliates are liable for the payment of these wages on the ground that Darlington, with others, was such an affiliate of Milliken and together they constituted a single employer.

In petition No. 8790 Darlington and Milliken seek to vacate these Board orders. In No. 8861 the Union, which was the charging party before the Board, prays that the orders be enlarged to require also the reopening of the Darlington plant with reinstatement of the employees, and that Roger Milliken, president of both Darlington and Milliken, notwithstanding the contrary decision of the Board, be held personally liable to satisfy the orders. In No. 8906 the Board seeks enforcement against Milliken of the Darlington liabilities.

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[2] 29 U. S. C. §158(a)(3).

Appendix A

As these actions have common issues they have been argued and considered together. We decline to enforce these orders of the Board against Darlington and Milliken.

Darlington, chartered under the laws of South Carolina, operated a print cloth mill there, manufacturing and selling cotton greige goods. It had no other plant. In 1937 Darlington went through a Section 77B bankruptcy proceeding, 11 U.S.C. § 207 (1937 ed.). Milliken, then known as Deering Milliken & Co., Inc., as one of the largest creditors, received in payment of its debt about 41% of Darlington's common stock. When Darlington was liquidated in 1956, as previously mentioned, there were outstanding 150,000 shares of common stock owned as follows:

Deering Milliken & Co., Inc	41.4%
Cotwool Manufacturing Corp.	18.3
Roger Milliken and members of his immediate family	6.4
Directors and employees of Deering Milliken & Co.	2.9
Outsiders or non-Milliken family or interests (about 100 stockholders living in South Carolina, 50 in New York, and more than 50 scattered over the United States)	31.0
	100.0%

In March 1956 the Union commenced a campaign to organize the Darlington employees and to become their

bargaining representative. An election conducted under the direction of the Board was called for September 6, 1956. The Union won, 258 to 252.

On September 12 Darlington filed objection to the election. A conference was requested on the same day by the Union to discuss a collective bargaining agreement. The request was refused by Darlington on the ground the election protest had not been decided and the Union had not been certified.

Also on September 12, the Board of Directors met, with all of them present. Following a brief discussion of the business status of Darlington, they resolved to recommend to the stockholders the liquidation and dissolution of the corporation. A meeting of the stockholders to act upon the resolution was called for October 17. Employees of Darlington were at once told of the recommendation. While no new ones were accepted, the plant continued to fill the orders then in hand. The objection of Darlington to the election was overruled on October 8, and the Union shortly certified as the bargaining representative.

With the stockholders on October 17 adopting the recommendation of the Board of Directors by a vote of 134,911 and shares 3,774, the officers proceeded with the liquidation. Discharge of employees occurred over a span of about six weeks: from 510 employees on October 13, the payroll dropped to 460 on October 20, to 345 on October 27 and to none when the plant closed on November 24. The machinery and equipment were sold at auction on

December 12 and 13, 1956. Since that time Darlington has not operated any plant in South Carolina or elsewhere[3].

Deering Milliken & Co., Inc.'s capital stock was owned in a majority amount by the members of the Milliken family. In addition they were the major (but by no means the only) shareholders in Darlington and in certain other textile corporations. The latter are the corporations referred to by the Board and in this opinion—somewhat imprecisely—as "affiliated corporations" of Milliken. Prior to 1960 Deering Milliken & Co., Inc. was not a manufactory. It was the exclusive sales representative of the producing corporations controlled by the Milliken family.

In June 1960 Deering Milliken & Co., Inc. was merged into the Cotwool Manufacturing Corporation, and the latter's name then changed to Deering, Milliken, Inc., herein known as Milliken. A majority of its stock was owned by the Milliken family. After the merger Milliken carried on the textile manufacturing formerly pursued by Cotwool.

The finding of the Board—that the decision to close the mill was an unfair labor practice under §8(a)(3)—was spelled out in this way:

> "Darlington discriminated in regard to its employees' tenure of employment by closing its plant—thereby discharged the employees—and, because the plant closing was the direct result of the employees'

[3] A concise history of the proceedings in this case appears in Judge Haynsworth's opinion for this Court in Deering Milliken, Inc. v. Johnston, 295 F. 2d 856 (1961).

> selection of the Charging Union as their collective bargaining representative, Darlington's retaliation against the employees for their activities in behalf of the Union discouraged the employees' continued membership in the Union."

Abridged and as pertinent here the terms of §8(a)(3) are these:

> "It shall be an unfair labor practice for an employer —by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

In this determination the Board acknowledged, as the Trial Examiner had found, that there were economic considerations sufficient in themselves to support the decision by Darlington to terminate operations. However, both the Examiner and the Board concluded that "the decision to close the mill was not a fact based on economic factors, and that, but for the Union's election victory, that decision would not then have been made."

Upon this premise the Board declared all the closure discharges to be unlawful, justifying the usual remedy of reinstatement and reimbursement for loss of pay. But with the shutdown complete and permanent reinstatement not achievable, the relief was necessarily directed primarily to restitution of wages. The monetary redress was awarded by the Board as follows:

> "[W]e shall therefore order the Respondent, Darlington, to provide back pay *until the discharged em-*

ployees are able to obtain substantially equivalent employment". [Accent added.]

Further, the Board overruling the Trial Examiner found that "Darlington occupied a single employer status with Deering Milliken and its affiliated corporations". On this basis Milliken and its affiliates were declared "liable for back pay to the same extent as we have heretofore directed with respect to Darlington" and were ordered to place the discharged employees on a preferred hiring list. Additionally, Milliken was commanded to offer employment to these discharged workers in its other mills in South Carolina or nearby States, without prejudice to their seniority and other privileges.

All of these orders were qualified by the proviso that if no work was available at the Milliken mills, then the accumulation of back pay would be tolled as and when the dischargees were put upon Milliken's preferential hiring list.

I. Our opinion is that the decision to close the plant was not an unfair labor practice. In this we accept the findings of fact made by the Board. While, as just observed, the evidence discloses substantial economic reasons warranting the determination to close the plant without reference to the entry of the Union into the plant, we accede arguendo to the contention of the Board that these reasons were not acted upon. Even if they were, however, we shall assume, again arguendo, with the Board that if unionization also played a part in the resolve to close the

plant, then the contribution of this factor may be considered as responsible for the cessation.

To go out of business in toto, or to discontinue it in part, permanently at any time, we think was Darlington's absolute prerogative. The fundamental purpose of the National Labor Relations Act is to preserve and protect the rights of both industry and labor so long as they are in the relationship of employer and employee. But the statute's scope does not exceed that province. It does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity, so long as the obligations of any employment contract have been met. Such withdrawal, alone and of itself, does not create any obligation of either the employer or the employee to the other under the Act. *Cf.* Dissenting opinion of Board Member Rodgers in the present case. If a cessation of business is adopted to avoid labor relations, the proprietor pays the price of it: permanent disssolution of his business, in whole or in part. A statute authorizing an order forcing the continued pursuit of operations in these circumstances would be of doubtful validity. Consider the consequences of an attempt to punish as contempt a violation of such an order, and its fatal infirmity is revealed: the proprietor would be jailed or otherwise penalized for not reopening a demised business reinstating employees.

Of course, the right of discontinuance which we here uphold, means an actual, unfeigned and permanent end of operations—not a removal, nor subcontract, nor a change

merely in the form of the corporate entity. No ruse or subterfuge is suggested here. Darlington's was an absolute desistence, not a temporary intermission as apparently was contemplated in NLRB v. Norma Mining Corp., 206 F. 2d 38 (4 Cir. 1953). There was no provisional lockout, the mill was not transplanted elsewhere, and its sale was concededly entire, bona fide and irrevocable. The Trial Examiner demonstrated beyond debate that Darlington was not a "runaway" plant—that is, a plant having another existence in another form—finding that Darlington was not hidden among the other Milliken corporations. No disagreement with this finding was, or on substantial evidence could have been, expressed by the Board.

"There is no decided case", the Board candidly states, "directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive". While a number of the decisions on the point mention the presence of a legitimate economic reason in connection with the right to close, an analysis of them discloses that they do not declare the existence of such a reason to be indispensable to the validity of the closing. See, *e.g.*, NLRB v. Preston Feed Corp., 309 F. 2d 346, 352 (4 Cir. 1962); NLRB v. New England Web, Inc., 309 F. 2d 696, 700 (1 Cir. 1962); NLRB v. Rapid Bindery, Inc., 293 F. 2d 170, 175 (2 Cir. 1961); Union Drawn Steel Co. v. NLRB, 109 F. 2d 587, 592 (3 Cir. 1940). Nor are they precedents for the proposition that an owner or operator cannot go out of business at his option if the closure is intended to be, and is in truth, absolute and permanent. These authorities, we think, support the view that if the termination is with-

out intent to resume the business elsewhere—as a runaway —the power to close, even if spurred by unionization, is not precluded by the Act.

The right is implicitly recognized in Southport Petroleum Co. v. NLRB, 315 U. S. 100, 106 (1942), with Justice Jackson saying, "Whether there was a *bona fide* discontinuance and a true change of ownership—*which would terminate the duty of reinstatement*" was a question of fact determinable by the Board or the Court on contempt proceedings. [Accent added.] Bona fide does not mean exclusively an economic ground, but as well that the termination was, as here, not merely a gesture but an actuality.

Lower courts have long given explicit sanction to the right of discontinuance. Over 20 years ago the Fifth Circuit said in NLRB v. Tupelo Garment Co., 122 F. 2d 603, 606 (5 Cir. 1941):

> "The stockholders of Tupelo Garment Co. [the employer] had the absolute right to dissolve their corporation and the Board was without authority to prevent this."

Recently, the Sixth Circuit put it this way in NLRB v. R. C. Mahon Co., 269 F. 2d 44, 47 (6 Cir. 1959):

> "We find nothing in the National Labor Relations Act which forbids a company, in line with its plans for operation, to eliminate some division of its work. As held in National Labor Relations Board v. Adkins Transfer Company, Inc., supra, [226 F. 2d 324] an employer faced with the practical choice, either of paying enhanced wage rates demanded by a union or of discontinuing a department of its business, is entitled to discontinue."

Other courts have spoken in like manner and as emphatically, *e.g.*, NLRB v. New England Web, Inc., *supra*, 309 F. 2d 696, 700; Jays Foods, Inc. v. NLRB, 292 F. 2d 317, 320 (7 Cir. 1961); NLRB v. New Madrid Mfg. Co., 215 F. 2d 908, 914 (8 Cir. 1954); NLRB v. Caroline Mills, Inc., 167 F. 2d 212, 214 (5 Cir. 1948); Atlas Underwear Co. v. NLRB, 116 F. 2d 1020, 1023 (6 Cir. 1941).

To be sure, there are decisions adjudging the employer liable even upon an absolute disposition of all or a part of the business equipment: NLRB v. Kelly & Picerne, Inc., 298 F. 2d 895 (1 Cir. 1962); NLRB v. Missouri Transit Co., 250 F. 2d 261 (8 Cir. 1957); NLRB v. Bank of America, 130 F. 2d 624 (9 Cir.), *cert. denied*, 318 U. S. 791 (1942). Upon examination, however, it will be observed that these cases did not involve the extinguishment altogether of the business and the end of further participation by the employer in his former sphere. The predominant element of the principle we maintain is that the business is no longer extant and the owner has forfeited the penalty for withdrawing, that is, he has foregone the privilege of further pursuit of his business.

II. The doctrine of single employer, heretofore noted, was used by the Board to project Darlington's liability, as determined by the Board, upon Milliken. See NLRB v. Gibraltar Industries, Inc., 307 F. 2d 428, 431 (4 Cir. 1962), *cert. denied*, 372 U. S. 911 (1963); NLRB v. Deena Artware, Inc., 361 U. S. 398 (1960). Our decision that Darlington is without liability, of course, bars such expansion of responsibility. Furthermore, even if Darlington was a division of Milliken, the transfer of Darlington's liability

to Milliken upon the single employer principle is precluded because, as we have stated, a part, like the whole, of a business may be abolished when the extinction is consummated in circumstances like the present.

III. In its petition the Union asked us to enlarge the Board's order to include Roger Milliken individually in the orders of restoration of wages entered by the Board. This prayer like the further prayer of the Union that Darlington be required to reopen its plant is, obviously, denied by our acquittal of Darlington of liability.

The Board sustained the Trial Examiner in finding that Darlington had violated §8(a)(1) in pre- and post-election statements and urging a repudiation of the Union. Likewise §8(a)(5)—wherein refusal to bargain is made an unfair practice—was found contravened by Darlington. Remedies for these offenses are not now available as Darlington is no longer alive.

Power to command an employer to stay in business indefinitely, or assess him with damages for permanently going out of business, is not a National Labor Relations Board prerogative. Assumed by the Board in these cases, it is denied here.

Enforcement of Orders Denied.

Appendix A

J. SPENCER BELL, Circuit Judge, dissenting:

If I read the majority opinion correctly it stands for the proposition that an employer may cease business in whole or in part for any reason, including anti-union bias, so long as such cessation is actual, unfeigned and permanent. It also holds that having ceased business and thereby terminated the employer-employee relationship, an employer may not be held liable under the National Labor Relations Act for any violations committed prior to his cessation of business. Since, in the opinion of the majority, an employer may cease business in part for any reason, including anti-union bias, they do not reach the question presented by the Board's finding that Deering Milliken[1] constituted a single employer of which Darlington was a part.

In my opinion the question presented to this court is whether an employer commits an unfair labor practice when he closes down a part of his business in order to discourage the practice and procedure of collective bargaining and to retaliate against his employees for exercising their freedom of self organization under the National Labor Relations Act. Not only does such conduct violate the basic policies embodied in the Act; it is literally within the proscription of Section 8(a)(3). Furthermore, it has been held to be an unfair labor practice by prior decisions of this and other Circuits, and I am unable to read the cases cited

[1] Throughout this opinion Deering Milliken is used to refer to the entire complex of 27 manufacturing corporations and the affiliated service corporations unless it is clear from the context that the reference is to the factoring and sales agency, Deering Milliken and Company, Inc., later merged into Cotwool Manufacturing Corp. and then called Deering Milliken, Inc.

by the majority in support of its opinion as holding to the contrary.

Single Employer Status

The Board found that there was a sufficient degree of common ownership and control of labor relations and operations among Darlington, Deering Milliken, and its affiliated corporations to hold that these entities were in reality a single employer under the National Labor Relations Act.

As this court held in *NLRB* v. *Gibraltar Industries, Inc.*, 307 F. 2d 428, 431 (4 Cir. 1962), *cert. denied*, 372 U. S. 911 (1963), a Board determination that two or more economic entities constitute a single employer is entitled to judicial approval if "there is substantial evidence in the record to support the Board's conclusion and order". The court in review, moreover, may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*". *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951). I am convinced, upon review of the record as a whole, that there was an abundance of evidence to support the Board's position that Darlington, Deering Milliken and its affiliates constituted a single employer for purposes of the Act.

The record reveals that Darlington at the time when it ceased operations was one of seventeen corporations in the Deering Milliken complex owning and operating twenty-seven manufacturing plants scattered throughout the Eastern Seaboard. Deering Milliken performed the dual function of selling goods produced by each of these

manufacturing corporations and factoring their accounts receivable[2].

The head of Deering Milliken's Tax Department, C. W. Kable, Jr., was an officer of each of the seventeen manufacturing corporations. His Department prepared all federal and state tax returns of the manufacturing corporations and advised them on a wide variety of tax benefits to be derived through following the Department's suggestions in such matters as accounting procedures, vacation plans, and incentive compensation contracts for supervisors. The Tax Department also advised the various manufacturing corporations in the proper drafting of minutes of directors' and stockholders' meetings.

The Deering Milliken Insurance Department handled all insurance for the various plants. The manufacturing corporations purchased standard forms of insurance through the Insurance Department, with policies running to each of them. Fire insurance and workmen's compensation insurance, however, were purchased under a policy covering all the plants, Significantly, Deering Milliken paid premiums on an executive air insurance policy covering both Deering Milliken executives and key manufacturing personnel, along with executives of Deering Milliken Service Corporation and Deering Milliken Research Corporation.

The Deering Milliken Service Corporation, a wholly owned subsidiary of the seventeen manufacturing corpora-

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[2] Each mill corporation was charged a fee for services rendered. The service charges made were substantially less than those which would have been made by independent selling and factoring agents. Also of importance is the fact that Deering Milliken had no other non-Milliken affiliated mills as clients.

tions, was organized in 1951 for the stated purpose of providing "essential services to organizations in the textile industry at the lowest possible cost". These services were restricted, almost exclusively, to those corporations in the Deering Milliken chain. Various departments of Deering Milliken Service purchased all machinery, equipment, and cotton for the manufacturing plants. Research was conducted in the area of product improvement and studies were regularly made in connection with production problems common to several or all of the plants. Based on its findings, Deering Milliken Service made recommendations to the various manufacturing corporations with a view toward obtaining maximum efficiency from raw materials, equipment, and personnel. These recommendations directly affected the work loads and work speeds in the manufacturing plants, a critical area of labor relations.

The Placement Department of Deering Milliken Service conducted an annual recruitment program among college students, seeking to attract supervisory personnel for each of the manufacturing corporations. The prospective management and technical trainees were encouraged to look upon the organization as a whole. The record reveals that after hiring there was considerable movement of supervisory personnel between corporations. For instance, approximately half of the supervisors who worked at Darlington between 1951 and 1956 were hired from other Deering Milliken corporations, as was Darlington's Mill Treasurer, James M. Oeland.

Supplementing the services carried on by Deering Milliken Service, Deering Milliken Research Corporation conducted surveys and inspections in the manufacturing plants

toward the goal of standardizing a preventative maintenance system common to all of the mills.

The record, in sum, reveals that the Deering Milliken complex was a thoroughly integrated, monolithic enterprise. The participating mills were able to call upon various service arms of the enterprise to effect optimum employment of men, material, and machinery. Sales were made and factored through a common agency. Management personnel was jointly recruited and transfers freely made from one corporation to another. Moreover, descriptive literature and advertising published by Deering Milliken on behalf of the manufacturing corporations repeatedly emphasized the generic brand name of Milliken rather than individual corporate brand names.

After the alleged unfair labor practices which formed the subject matter of the present controversy, Deering Milliken & Co., Inc., in 1960 merged into the Cotwool Manufacturing Corp. to form Deering Milliken, Inc., and several of Cotwool's former subsidiaries were then liquidated into Deering Milliken, Inc. I find the merger of more than passing interest. To me it indicates that the separate corporate entities of the Deering Milliken complex were largely paper corporations which could be shifted and changed at the convenience of the Milliken family. This is highlighted by the fact that the various liquidations and mergers had no substantial effect on the actual functioning of the various entities within the Deering Milliken enterprise. Minot Milliken, Vice President of Deering Milliken, Inc., himself testified that nothing "of substance" was changed as a result of the merger. I think the ease with which this corporate change was made in 1960 strongly indi-

cates that the Deering Milliken complex in 1956 at the time of Darlington's dissolution was a single employer in which "corporate forms [were] largely paper arrangements that [did] not reflect the business realities". *NLRB* v. *Deena Artware, Inc.*, 361 U. S. 398, 403 (1960). The critical question becomes, therefore, did the Board have substantial evidence upon which to base its conclusion that there was a degree of common control and ownership existing in this unified industrial complex to warrant finding a single employer?

As pointed out in the majority opinion, Deering Milliken's capital stock was owned in majority amount by the members of the Milliken family. In addition they owned controlling stock in Darlington and in all of the other manufacturing corporations. These mill corporations, in turn, owned all the shares of Deering Milliken Service Corporation, and, along with Deering Milliken & Co., Inc., all the shares in Deering Milliken Research Corporation. The stock ownership was used by the Milliken family to place members of the Milliken family in the postion of corporate officers and board directors of the various corporations. Roger Milliken was President of Deering Milliken and President also of all the manufacturing corporations except Laurens (where he was Vice President and on the Board of Directors). A majority of the directors of all the manufacturing corporations except one (Hartsville) were members of the Milliken family. Deering Milliken doesn't seriously deny that the Milliken family's stock ownership permitted the family, and more specifically Roger Milliken, to exercise dominion and control over all phases of business and labor relations at each mill and over each and every corpo-

rate entity in the entire complex, but rather, it strongly denies that such control was actually exercised.

The Board found that through majority stock ownership and interlocking directories, the Milliken family (especially in the person of Roger Milliken) was able to and did exercise actual control in the area of labor relations. As stated by the Board:

> "Roger Milliken, the president of all of the corporations save one, exercised ultimate control over the labor relations of all of the corporations. Thus he received reports from each of the mills as to progress in reducing the number of jobs, the pay raises given, hours worked and job assignments, was asked for approval of various personnel actions, and made suggestions as to the hiring of personnel. More important, however, was Roger Milliken's participation in the area having the greatest impact on labor relations—the area of collective bargaining. Thus he circulated a memorandum and editorial which was obviously intended as a primer for the managers of the mills in combatting union organization. During the organizational campaign his pervasive influence was demonstrated by the statements of supervisory employees that Roger Milliken would close the plant rather than permit its unionization."

The Board does not suggest that Roger Milliken actually engaged in the day to day direction of labor relations at each of the plants. The day to day details inevitably had to be left to the resident chief executive officers, the Mill Treasurers. Everything other than over-all direction and guidance as to company policy of labor relations would, of necessity, have to be exercised by subordinates. Indeed it

seems remarkable that Roger Milliken had the time, in view of his far flung interests and responsibilities, to keep informed about labor relations in the individual mills and to make the detailed suggestions as to many facets of labor relations that the record reveals he did. The record is replete with suggestions and recommendations by Roger Milliken to the Mill Treasurers o ways to improve production and reduce jobs. For instance, Roger Milliken on different occasions proposed that each piece of machinery be tagged with its cost to discourage misuse, that closed circuit television be utilized to eliminate certain jobs, that machinery be rearranged to reduce the operator's walking distance. that the time which employees spent smoking be limited, and that beverage dispensing machines for employee use be installed. These suggestions were usually made in reference to "our" mills. These and other suggestions were not always followed, but they unmistakably indicate that Roger Milliken kept himself constantly informed as to what was occurring and didn't hesitate to suggest improvements.

Proof of Roger Milliken's ultimate and uncontradicted control over major policies affecting labor relations was illustrated by his decision, with approval of his family, to close the Darlintgon plant because of the employees' decision to be represented by a union.

After the union had won the Board supervised election of September 6, 1956, Darlington Mill Treasurer Oeland and Darlington attorney Poag telephoned Roger Milliken to advise him of the union's victory. One day later, Roger Milliken decided to close down the mill. Roger Milliken informed three members of his family, who were on the

Darlington Board of Directors, of his intention to close the mill, he did not inform Mill-Treasurer Oeland. On September 12, the Board met and unanimously passed a resolution to close the mill. This resolution was acted upon at a shareholders' meeting of October 17 and passed by a large majority, with only a few shareholders who were residents of the Town of Darlington voting against liquidation. Immediately after the shareholders' meeting, Roger Milliken was informed by South Carolina State Senator Mozingo, a resident of the Town of Darlington, the 83% of the mill employees had signed a petition to go back to work. Roger Milliken's reply was: "As long as there are 17% of the hard core crowd here I refuse to run the mill".

Thus I find in the record overwhelming evidence to support the Board's holding:

> "[W]e conclude that Deering Milliken, primarily through the person of Roger Milliken, exercised control over the labor relations of all the corporations, including Darlington. Although the details of day-to-day personnel relations may have been, of necessity, conducted at the mills, it is manifest that the major decisions were exclusively in the hands of Roger Milliken. Under such circumstances it is clear that Deering-Milliken must assume responsibility for control of Darlington's labor relations."

Deering Milliken's brief contends that the Board had no basis to find that Roger Milliken was not acting solely in his capacity as President of Darlington Mills. The evidence, however, points to the fact that Roger Milliken retained ultimate control over the whole Milliken complex and acted as its chief executive officer, without delineating

his various capacities. The Darlington Mill was but a small unit in a vast industrial empire employing more than 19,000 persons owned and controlled directly or indirectly by the Milliken family. Its closure was intended to be and was a grim deterrent to the thousands of employees in the affiliated plants who might entertain similar notions of unionization. Such conduct was properly considered by the Board to fasten responsibility of his actions for unfair labor practices upon the entire complex.

Closing Mill Unfair Labor Practice

Having found that the Board had ample evidence to conclude that the Milliken complex was a single employer under the NLRA, the next question to consider is whether under the decided cases, the act of Deering Milliken in shutting down the Darlington plant was an unfair labor practice, cognizable under Section 8(a)(3).

That the plant closure was the direct result of the organizational activities of the employees is too well documented by the record to require extended discussion. Roger Milliken himself gave that reason to his stockholders for his decision to close the mill. On approximately thirty separate occasions, supervisory personnel threatened the employees with closure in case the union won, and attributed their prophesies to Roger Milliken's well publicized hostility to unions. Milliken himself circulated to all of his mills a trade magazine article pointing out that his attitude was so well known that liquidation was inevitable from the minute the election result was announced. Darlington's belated efforts to stress the economic factors are

belied by the prior history of the mill. In the nine months prior to the election, management had spent $400,000.00 in a modernization program which included not only new machinery but additions to plant structure. A belief that union wage demands and bargaining attitudes towards work loads may make future operations unprofitable does not constitute an economic reason which would excuse the respondent's conduct in this case. The Board found upon abundant evidence that the respondent's conduct was discriminatorily motivated.

> "Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach on protected rights. The employer's claim of legitimacy is thereby totally dispelled. [Citing cases].
>
> ". . . 'The ultimate problem is the balancing of conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review. Labor Board v. Truck Drivers Union, 353 U. S. 87, 96'." *National Labor Relations Board* v. *Erie Resistor Corporation, et al.*, 31 U. S. L. W. 4407, 4409, 4411 (U. S. May 13, 1963).

This court has held, in unison with other Circuits, that an employer may neither temporarily shut down operations to avoid bargaining with a union, *NLRB* v. *Norma Mining Corp.*, 206 F. 2d 38 (4 Cir. 1953), nor may he subcontract out work to another employer formerly done by a division in his business for that purpose, *NLRB* v. *Preston Feed*

Corp., 309 F. 2d 346 (4 Cir. 1962). Moreover, other Courts of Appeals have held that an employer may not transfer work to another plant owned, directly or indirectly by the employer himself, to avoid bargaining. See e.g., *NLRB* v. *United States Air Conditioning Corp.*, 302 F. 2d 280 (1 Cir. 1962); *NLRB* v. *Winchester Electronics, Inc.*, 295 F. 2d 288 (2 Cir. 1961); *NLRB* v. *Lexington Electric Products Co.*, 283 F. 2d 54 (3 Cir. 1960); *cert. denied*, 365 U. S. 845 (1961); *Butler Bros.* v. *NLRB*, 134 F. 2d 981 (7 Cir. 1943). I fail to see any distinction in principle between such conduct and that of the Respondent here.

More to the point, I consider the decision of this court in *NLRB* v. *Preston Feed Corporation*, 309 F. 2d 346 (4 Cir. 1962) as controlling on the legal issue here. In that case the Board sought enforcement of its order requiring the employer to reinstate its trucking operations which the Board found had been closed down in order to discourage unionization among its employees. This court enforced the order, pointing out that although the employer had decided for valid economic reasons to close the operation in the future, its sudden and precipitate closure was to discourage unionization and, therefore, constituted an unfair labor practice which could be remedied by requiring reopening until the employer could vindicate its closing for economic reasons. Judge Soper, speaking for a unanimous court, recognized the employer's right to close for valid economic reasons:

> "The question has been considered in a number of cases in which the Board, in order to effectuate the

purposes of the Act, has thought it desirable to require an employer to continue a certain business operation or department which he desired to abandon. In these cases it has been uniformly held that the Board is without power to interfere with management *where the discontinuance of a part of the business is prompted by legitimate business motives and not in order to frustrate the purposes of the Act or interfere with employees in the exercise of rights conferred upon them by the statute.* (Citing cases) (Emphasis added.).

"In the instant case, as we have seen, the initial decision of the Company to close its trucking department was based on economic reasons and not on hostility to the union, but the immediate decision and the prompt closing of the department on March 6th, when it was discovered that the employees led by the union were insisting upon their rights under the statute, was impelled by the intent to restrain the employees in their rights to collective bargaining. We shall, accordingly, enter a decree that the order of the Board in these and other particulars be enforced. . . ." 309 F. 2d 352.

It is apparent that the Board's order in this case is within the rationale of this Court's judgment in the *Preston* case. See also *NLRB* v. *Norma Mining Corp.*, 206 F. 2d 38 (4 Cir. 1953), where this court through Judge Dobie, speaking for a unanimous court, enforced the order of the Board requiring an operating lessee to reopen a mine closed by the employer in violation of Section 8(a)(1) and (3) of the Act.

Again, the Eighth Circuit in *NLRB* v. *Missouri Transit Co.*, 250 F. 2d 261 (8 Cir. 1957) faced a situation closely analogous to the one we have here. The Board's finding of an unfair labor practice and the relief granted by the Board and enforced by the court support the Board in this case. The Missouri Transit Company was a common carrier of passengers by bus for hire engaged in two operations: one a short-line intrastate shuttle bus operation between Waynesville, Missouri, and Fort Leonard Wood, Missouri; the other a long-line interstate bus operation between Fort Leonard Wood and Cedar Rapids, Iowa. As a result of union attempts to organize the shuttle-line bus drivers, the company sold all the equipment used in the operation of the shuttle route to a competitor. This action resulted in the discontinuance by the company of the shuttle-line route and service, and terminated the employment of all shuttle-line bus drivers. Upon the filing of an unfair labor practice against the company, the Board found that the company had disposed of the shuttle-line route and equipment used in operating it, and had discharged the shuttle-line drivers, for discriminatory reasons, in violation of Sections 8(a)(3) and (1) of the Act. In granting affirmative relief, the Board ordered that the company place the discharged drivers on a preferential hiring list for priority consideration for jobs in the long-line operations and that the company pay back wages to these individuals from the date that the shuttle-line bus operations were closed to the date when they were either reinstated or placed on a preferential hiring list.

The company contended that the Board was powerless either to order back pay beyond the time when the shuttle-line bus operation ceased or to order reinstatement in a completely separate and independent division of the company. The Eighth Circuit rejected the Company's contentions and ordered enforcement of the Board's order in full. I think the logic of the *Missouri Transit* case compelling and the application of the principles announced clearly appropriate to case here being considered.

In *NLRB* v. *Wallick*, 198 F. 2d 477 (3 Cir. 1952), that court sustained a Board order requiring a respondent partnership which operated several enterprises engaged in the manufacture of ladies' garments to either reopen a plant which it had closed in violation of the Act because its employees had organized or give its employees an opportunity to work in other plants operated by the partnership. This was true even though the closed plant was owned by a separate corporation the stock of which was owned by the individual partners. See also *A. M. Andrews Co. of Oregon* v. *NLRB*, 236 F. 2d 44 (9 Cir. 1956).

In the present case, even absent single-stockholder status, the employees had a remedy. After the Darlington stockholders on October 17, 1956, had adopted the recommendations of the Board of Directors to liquidate the Darlington Mill, employees were discharged in separate groups over the intervening period until the plant closed on November 24. Yet, pursuant to the laws of South Carolina, the corporation continued to exist for the purpose of liquidating its assets and settling its liabilities. If, as the Board found, amply supported by the record as a whole, these discharges were for discriminatory reasons

under Section 8(a)(3), relating to the employees' "tenure of employment", then at a very minimum the amounts realized from the sale of Darlington machinery and equipment should be allocated to reimbursing the discharged employees for lost wages from the time of their discharge until the liquidation of the corporation had been completed. It is obvious that if one or two, or even a majority of employees had been discharged for their activities on behalf of the union, then the court would uphold a Board finding of an 8(a)(3) violation. It seems tortuous logic to say, therefore, that because the company discharged without distinction both the employees who voted against the union (but who were discharged nonetheless because a majority of the employees elected to be represented by a union), the company is absolved from liability under the Act.

But beyond this remedy I think the Board was justified in ordering Deering Milliken to provide back pay until the discharged employees were able to obtain substantially equivalent employment. The record reveals that a large number of Darlington supervisory personnel was absorbed into the Deering Milliken complex. Late in September 1956, the Deering Milliken Industrial Engineering Department sought and obtained from Darlington Mill Treasurer Oeland a list of Darlington Supervisory personnel who might be "useful" to it. All of these men were interviewed by the Department. Plans were made to have all supervisory personnel of the Darlington Mill transferred to the Department's payroll for a three month period after their separation from Darlington. The purpose of this arrangement was to provide a period of time within which

these men could be "picked up" by other Deering Milliken Mills. Some of these supervisors were actually picked up, going directly on the payroll of other mills without an interval on the payroll of the Department. Others were transferred to other parts of the Deering Milliken organization. Although some supervisors ceased their affiliation with Deering Milliken entirely, they were given time off, with pay, in which to seek new employment opportunities. One of these men was Mill Treasurer Oeland, who remained on the Darlington payroll until July, 1957, some seven months after mill machinery and equipment had been sold. In addition, a few supervisors received bonus payments after the Darlington closing in appreciation of their efforts during the union crisis. Thus, even though the Deering Milliken complex disclaims any responsibilities after the Darlington closing for those whom it regards as its enemies, it managed to reward and find places for those whom it regarded as its friends. I see nothing to prevent enforcing the Board's order which would also require Deering Milliken to offer substantially equivalent employment to non-supervisory personnel who were equally adversely affected by the mill's closing.

I am not unmindful of the Board's findings that Darlington committed other violations in addition to the 8(a)(3) here discussed, specifically 8(a)(1) and 8(a)(5). The repeated threats of members of management that the mill would be shut down if the union won the representation election constituted a classic form of interference, restraint, and coercion proscribed by Section 8(a)(1). Section 8(a)(1) was also violated by management threats to blacklist union adherents, their interrogation of employees regard-

ing their union activity, and their support of a petition disavowing the union after the announced intention of Roger Milliken to close the mill upon learning of the union victory.

The Board also found that the failure of the Company to bargain with the union with respect to the tenure of employment of the employees in the Darlington Mill and to furnish the union with wage and related bargaining data constituted an unfair labor practice under Sections 8(a)(5) and (1). I am convinced that the record as a whole amply supports the Board's findings, but do not feel that an extended discussion of these violations is warranted here.

APPENDIX B

National Labor Relations Act

Sec. 2

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

Appendix B

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made [and

has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h)], and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Sec. 10 (c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such un-

fair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or

examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.